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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-272

STATE OF GEORGIA, ET AL., *Petitioners,*

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF DEMOCRATIC PARTY RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CITATIONS

CASE:

Bode v. *National Democratic Party*, No. 71-1536, D.C. Cir. 9

UNITED STATES CONSTITUTION:

Amendment XIV, § 1 2

MISCELLANEOUS:

P. David, R. Goldman & R. Bain, *The Politics of National Party Conventions* (1960) 4, 8

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OPINIONS BELOW

The opinions of the District Court and the Court of Appeals, neither of which is yet reported, are printed in the appendix to the petition.

JURISDICTION

The petition for a writ of certiorari was timely filed on August 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTION PRESENTED

Whether population is the sole permissible constitutional criterion for the allocation of delegates among the states and the District of Columbia at national political party presidential nominating conventions.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The complaint in this case was filed on March 25, 1970. On November 24, 1970 the United States District Court for the District of Columbia entered an order dismissing the complaint. On July 23, 1971 the United States Court of Appeals for the District of Columbia Circuit affirmed that judgment.

STATEMENT OF FACTS

The state of Georgia and several of her citizens, led by then Governor Lester Maddox, sued the National Democratic Party and the National Republican

Party,[1] seeking an order requiring that delegates to both national party presidential nominating conventions in 1972 be allocated among the states exclusively on the basis of population. The District Court held that the complaint did not present a justiciable issue because "there are no judicially discoverable and manageable standards by which to frame appropriate relief." (App. 63)[2] The court also concluded that delegate allocation formulas employed in the past by the national political parties had furthered "their legitimate purposes and [were] neither arbitrary, capricious or violative of any right guaranteed under the Fourteenth Amendment." (App. 62)

The Court of Appeals held that the issue presented by this lawsuit was justiciable,[3] but declined to impose petitioners' strict population delegate allocation formula on the national political parties. It held that there had been no showing either that the delegate allocation formulas adopted by the Democratic and Repub-

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[1] The complaint also named several officials of both parties as defendants. This brief is filed on behalf of the National Democratic Party, the Democratic National Committee, Flaxie M. Pinkett and Channing E. Phillips. Miss Pinkett and Mr. Phillips are the Democratic National Committeewoman and Committeeman from the District of Columbia.

[2] Citations to "(App.)" are to the Appendix in the Court of Appeals. Citations to "(Pet. App.)" are to the Appendix to the petition for a writ of certiorari.

[3] The court also held that the allocation of delegates among the states at a national presidential nominating convention of either of the two major political parties involved "state action" for the purpose of applying equal protection standards. (Pet. App. 7a-12a) The Democratic respondents do not concede the correctness of the decision below on either the question of justiciability or state action. However, neither of those issues is raised by the present petition.

lican parties were irrational under the traditional equal protection test (Pet. App. 18a), or that the petitioners' proposed formula was required by the concept of equal representation at party conventions. Indeed, it found that

> the imposition of a population-based criterion would constitute a departure from the *equal representation* standard underlying the reapportionment cases. While population may be an appropriate measuring rod when public officials are to be elected and held responsible to the entire citizenry, population alone is an inappropriate test of representation in the framework of national politics where parties compete for membership. Although both major parties are constantly striving to garner a greater share of the voting population's support, neither has yet been so successful as to permit it to claim representation of the entire population. The constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from election to election.

(Pet. App. 16a-17a) (footnotes omitted).

Neither major party has ever apportioned its convention on a strict population basis. Historically the principal basis for allocating delegates among the states in both parties has been the electoral college strength of the respective states.[4] Over the years both parties developed the practice of including "victory bonus votes" for states which had supported the party's candidates in recent general elections, both as a means of providing organizational incentive and as a rough

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[4] See P. David, R. Goldman & R. Bain, The Politics of National Party Conventions 164 (1960).

indicator of the traditional sources of party strength. Both major party conventions in 1968 were apportioned on the basis of formulas predicated on a combination of electoral college strength and recent voting performance. (See Pet. App. 20a-22a)

At the time this suit was filed and decided by the District Court no delegate allocation formula for the 1972 Democratic National Convention had been adopted.[5] The 1968 Democratic National Convention appointed a commission, the Rules Commission of the Democratic National Committee, to study, among other things, the problem of delegate allocation and to recommend a new formula to the Democratic National Committee. That commission reported to the Democratic National Committee in February 1971, and on February 19, 1971 the full Committee, following an entire day of discussion and debate, adopted a formula allocating 3,016 delegates among the states, the District of Columbia, Puerto Rico and the territories as follows:

> —3,000 delegates are divided among the states and the District of Columbia, roughly one-half on the basis of electoral college strength and roughly one-half on the basis of the average number of votes for the Democratic presidential candidate in the last three presidential elections; each state receives three delegate votes for each electoral vote it will possess in 1972, for a total of 1,614 delegate votes, and the remaining 1,386 delegate votes are apportioned on the basis of past voting performance.

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[5] The 1968 Republican National Convention adopted an allocation formula governing the 1972 convention. It is almost identical to the formula under which delegates were allocated for the 1968 Republican Convention. (Compare Pet. App. 21a-22a with *id.* 25a-27a)

—16 delegate votes are allocated to the Commonwealth of Puerto Rico and the territories of the Canal Zone, Guam and the Virgin Islands, with Puerto Rico receiving seven votes and each of the territories receiving three votes.

The record in the Court of Appeals was supplemented to include the newly adopted Democratic formula, but the court did not rule on its validity in view of the narrow question presented by this case—whether the Constitution compels the adoption of a strict population formula for allocating delegates. (Pet. App. 18a-19a)

REASONS TO DENY THE WRIT

The decision below is plainly correct, and there is no occasion for further review by this Court.

Petitioners seek to invoke the legislative reapportionment decisions of this Court to impose upon national party nominating conventions their population apportionment standard as the only constitutionally permissible means of allocating delegates among the states. As the Court below noted, however, the analogy to the legislative reapportionment decisions breaks down at two points critical to the applicability of those decisions to this case.

The function of a national presidential nominating convention is to choose nominees for President and Vice President to represent the party in the general election, and to organize the campaign to support those nominees. The structuring of a convention to perform these functions may involve numerous considerations other than the strict notion of equal representation of a constituency. For example, presidential campaigns are largely conducted on a state-by-state basis

in light of the constitutionally mandated electoral college method of choosing a President. Party morale and organization in each state is thus vital to the election campaign. If the notion of constituent representation results in delegate allocation formulas which ignore the constitutional reality of the electoral college and the healthy political reality of party morale in the individual states, the convention may be crippled in its attempt to choose an electable nominee and begin his campaign for the presidency.

Second, and more important, the analogy to the legislative reapportionment cases breaks down because, even if we assume that a national political convention is a representative body in the same sense in which a legislature is, strict population as a standard for apportionment does not result in equal representation for the party's presumed constituency. It can be demonstrated historically that an apportionment formula which takes no account of the uneven distribution of party strength throughout the nation produces gross distortions in the makeup of a convention and may lead to disastrous results at the polls for the party's nominee.

The clearest example is provided by the election of 1912. President William Howard Taft sought renomination on the Republican ticket that year and came to the convention with the solid support of the delegations from the southern states. The convention was apportioned on the basis of the states' electoral college strength without regard to the traditional sources of Republican party support.

President Taft's control of the southern delegations allowed him to defeat the nomination bid of former

President Theodore Roosevelt. However, strong pro-Roosevelt sentiment in other sections of the country led to the formation of the Bull Moose Party and a separate Roosevelt candidacy.

The southern delegate strength which had held the nomination for Taft could not be translated into popular or electoral votes because of the state of virtual desuetude into which the Republican Party had fallen in the South following the end of Reconstruction. The result was an easy victory for the Democratic nominee, Woodrow Wilson, and smashing defeat for President Taft, who finished third in the popular vote. See generally P. David, R. Goldman & R. Bain, The Politics of National Party Conventions 166-67.

The lesson gleaned by the Republicans from the debacle of 1912 was that delegate allocation formulas simply must take account of the uneven distribution of party strength to avoid losing all touch with the reality of the electoral process. In 1916 the Republicans began granting "victory bonus votes" to states which cast their votes for the Republican nominee, in an effort to identify and reward traditional party strongholds. The Democrats followed suit in the 1940's, and every convention of either party since that time has recognized traditional sources of party strength in its apportionment formula.

To insist at this late date, as petitioners do, that population is the only factor which the Constitution permits major national political parties to take into account in apportioning their conventions, is to ignore the lessons of history and to invite a repetition of the Bull Moose episode. As the Bull Moose episode clearly demonstrates, it is simply inaccurate to say, as peti-

tioners repeatedly do, that citizens in certain states are either "underrepresented" or "overrepresented" at a party convention because the convention is not apportioned on the basis of population. However difficult it may be to identify a party's constituency, it is plain that neither the Democratic Party nor the Republican Party can claim all the citizens of any state as adherents.

The question of what constraints, if any, the equal protection clause may place upon the allocation of delegates at national party nominating conventions poses difficult problems. In the absence of invidious discrimination, we submit, there is a broad range of factors which a party may legitimately and rationally take into account under traditional equal protection standards in distributing power within its councils. This case, however, is not an appropriate vehicle for examining the relationship between equal protection and the national party convention.[6] For the sole question presented is whether population is the only permissible criterion under the Constitution. And the

[6] There is presently pending in the United States Court of Appeals for the District of Columbia Circuit a case which raises related issues regarding the allocation of delegates of national party nominating conventions. *Bode* v. *National Democratic Party*, No. 71-1536, D.C. Cir. In *Bode* a group of dissident Democrats sued the Democratic Party following the adoption of the allocation formula for 1972, claiming that the only permissible allocation formula under the equal protection clause is one based exclusively on past voting performance. The District Court in the *Bode* case found the question presented to be justiciable, held that the Democratic National Committee's 1972 formula did not meet equal protection standards, and concluded that past voting performance was the sole acceptable criterion. The case was argued and submitted to the Court of Appeals on August 25, 1971. No decision has yet been rendered.

lessons of logic and history are clear on that score. The Constitution cannot be read to impose upon political parties an apportionment system which bears no relationship whatever to the function of a presidential nominating convention or to the realities of the electoral process.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AND MRS. J. WILLARD MARRIOTT IN OPPOSITION

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BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AND MRS. J. WILLARD MARRIOTT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinion below and the basis of this Court's jurisdiction are adequately described in the Petition (p 2.).

QUESTION PRESENTED

Must the 1972 Republican and the 1972 Democratic Conventions be reapportioned so that delegates will be allocated among the various states on a strict population basis.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are adequately set forth in the Petition (pp. 3-4).

STATEMENT OF THE CASE

This is an action brought by the Petitioners, the State of Georgia, its Secretary of State, the State Election Board, and individual Georgia residents claiming to represent all registered voters of the State of Georgia, seeking to compel the reapportionment of the 1972 Democratic National Convention and the 1972 Republican National Convention. The Petitioners seek to require that delegates to these conventions be apportioned among the various states, the District of Columbia, the Commonwealth of Puerto Rico and the Territories on the basis of total population. Petitioners urge that this action is required by the Fourteenth Amendment of the United States Constitution.

The apportionment formula for delegates to the 1972 Republican National Convention adopted by the 1968 Republican National Convention and the rules adopted by that Convention relative to the selection of the 1972 delegates are reproduced in the Appendix (App. p. 1). The delegates so chosen are each entitled to one vote at the 1972 Republican National Convention.

The Petitioners have not attempted to show, and there is nothing in the record to indicate that the Re-

publican delegate allocation formula results in the delegates having unequal constituencies, if a standard other than total population is used. The Court below stated that even assuming there is a requirement of equal representation, equal representation would not result from an allocation of delegates on a strict population basis. Petitioners have shown only that the convention delegates are not allocated to each State on the basis of that state's population. They have not suggested any other basis for allocation, and have not shown that the allocation formula used causes a deviation from any standard that could be considered proper.

REASONS FOR DENYING THE WRIT

The question decided by the Court below is not of a character warranting review by this Court. Petitioners' arguments in support of the single and limited claim they present are essentially the same as those advanced in the Court below, namely, that the delegate allocation formulas do not result in each delegate to the national convention representing an equal segment of the national population. The decision of the Court of Appeals that this is not required is clearly correct.

I.

Total population is not an appropriate basis for allocating delegates among the various states.

The Court of Appeals held only that population alone is not "the touchstone of the one man, one vote rule" as the Petitioners seek to apply such rule in this case. The Court below correctly stated that a delegate to a national political convention does not and is not intended to represent the entire population of his state. One of the principal functions of a delegate to a na-